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No. 88-428

# In the Supreme Court of the United States

OCTOBER TERM, 1988

C. WILLIAM VERITY, JR., SECRETARY OF COMMERCE, ET AL., PETITIONERS

*v.*

CENTER FOR ENVIRONMENTAL EDUCATION, ET AL.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

## BRIEF BY RESPONDENT FEDERATION OF JAPAN SALMON FISHERIES COOPERATIVE ASSOCIATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Did the Court of Appeals err when it refused to adopt an abuse-of-discretion standard to review whether the Department of Commerce must in every instance deny a permit for the incidental taking of one stock of marine mammals that meets the statutory criteria for a permit under the Marine Mammal Protection Act, 16 U.S.C. (& Supp. IV) § 1361 *et seq.* ("MMPA") in order to deal with the inevitable incidental take of an environmentally negligible number of animals from another stock not covered by the permit, where (a) denial of a permit in such circumstances is not a remedy specified in the MMPA, (b) the MMPA does not address the issue, (c) the agency has determined to use remedies specified in the MMPA, (d) the agency's approach is supported by a Congressionally-appointed watchdog agency, and (e) the agency's approach maximizes the overall attainment of the goals under the MMPA?

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## STATEMENT

On February 16, 1988, a sharply divided Court of Appeals (Judge Starr dissenting) ruled that over a decade of Department of Commerce regulatory policy should be overturned and enjoined. (App., 1a-31a.)[1]

[1] "App., __" refers to the Appendices to the petition for writ of certiorari by petitioners C. William Verity, Secretary of Commerce, *et al.*

Judge Starr's dissent (App., 17a-31a) stresses that the "counter-intuitive" majority opinion overturns a regulatory regime that is "undeniably *maximizing* the overall goal of the [Marine Mammal Protection] Act[2] to reduce or eliminate marine mammal takings." The "overall result" of the majority decision "may very well be, ironically, reduced protection for marine mammals." In addition, the majority opinion will produce "the odd outcome of calling a complete halt to important fishing operations with clear foreign policy implications." (App. 18a, 27a.) (Emphasis in original.)

The question arises: if the Court of Appeals decision has such a bizarre result did the Court review the agency's policy under the wrong standard of review?

The agency policy is that the Department of Commerce will use enforcement discretion concerning a permit for the taking of one stock of marine mammals incidental to commercial fishing operations where an environmentally insignificant number of other animals are unintentionally taken. This policy dates back to at least 1977 and has been followed in virtually every incidental take permit proceeding under the MMPA since then. The agency policy has been endorsed by virtually everyone involved -- including the Department of Commerce, the Congressionally-created watchdog Marine Mammal Commission,[3] numerous environmental groups (including three of the environmental respondents here),[4] Congress, and courts. Can the agency's reading of the statute be impermissible when so many responsible entities have read it the same way for over a decade?

In the rulemaking proceeding here the agency, after carefully evaluating the effect on stocks, weighing the statutory con-

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[2] 16 U.S.C. (& Supp. IV) § 1361 *et seq.* ("MMPA").

[3] "It was Congress' intention that the Marine Mammal Commission should play a significant advisory role in the protection of marine mammals." *Committee for Humane Legislation v. Richardson*, 414 F. Supp. 297, 304 n. 16 (D.D.C.), *aff'd*, 540 F.2d 1141 (D.C. Cir. 1976).

[4] The Sierra Club, Humane Society of the United States, and Animal Protection Institute.

siderations in the MMPA, and following the advice of the Marine Mammal Commission, determined to grant a permit for Dall's porpoise and to issue fines for the environmentally negligible accidental take of other animals. 52 Fed. Reg. 19874 (May 28, 1987). Such fines are one of the discretionary remedies in the MMPA. See 16 U.S.C. §§ 1374-75.

The agency's policy was overturned by the District Court (Norma Holloway Johnson, J.) (App., 32a-59a), and a divided Court of Appeal's affirmed (App., 1a-31a). The Court of Appeals majority refused to apply an abuse-of-discretion standard to review the agency's policy and, without regard to the reasonableness of the agency's approach, ruled that a permit could not be granted for one stock (Dall's porpoise) that meets the statutory criteria for a permit where even a few animals from another stock not covered by the permit would be taken. In the light of the extremely broad definition of "take"[5] this would preclude issuance of a permit where there would be even a momentary, unintentional and non-injurious restraint of a few animals not covered by the permit.

The Department has petitioned for Supreme Court review. The Federation of Japan Salmon Fisheries Cooperative Association, which is the applicant for renewal of the permit that had been in effect since 1981, urges that the writ be granted.

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[5] The MMPA defines "take" to mean "to harass, hunt, cpature or kill, or attempt to harrass, hunt, capture or kill any marine mammal." 16 U.S.C. § 1362(12). The term "harrass" includes "the restraint or detention of a marine mammal, no matter how temporary." 50 C.F.R. § 216.3 (1986).

> remarkable remedy that the District Court has chosen to craft here and that the court today affirms --that is, an injunction against issuing a permit for the taking of one species when another, for which no permit may lawfully issue, will inevitably be taken." (App., 23a n.5.)

Even the statutorily-provided remedies (16 U.S.C. §§ 1374-75) are discretionary. And an amendment offered in the Senate in 1972 to make the enforcement provisions more stringent was rejected.[8] Furthermore, the approach adopted by the agency was with the full concurrence of the Congressionally-created watchdog Marine Mammal Commission.

### B. The Decision Of The Court Of Appeals Should Be Reviewed Because Of Its Severe Environmental And Foreign Policy Implications.

There are compelling public policy reasons for Supreme Court review of this case. The decision halts a longstanding general enforcement policy based upon a solid consensus concerning proper international management of marine resources. And does so where the result will be lessened protection for marine mammals and other policies sought to be advanced by the MMPA.

As stressed by Judge Starr:

> "[T]he result of today's decision raises the danger that the Japanese will terminate their treaty obligations under the INPFC. The overall result may very well be, ironically, reduced protection for marine mammals, if the Japanese fleet withdraws from fishing activity subject to NOAA regulation. That unhappy state of affairs would be but another testament to the recurring reality of unintended consequences." (Starr, J., dissent, App., 27a.)

In that regard, the decision jeopardizes a multilateral conservation regime among the United States, Japan, and Canada, pur-

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[8] 118 Cong. Rec. 25269-70, 25290 (July 25, 1972).

suant to a treaty under which since 1952 the parties have strived for the conservation of marine resources in the North Pacific and Bering Sea, including marine mammals and salmon of North American origin. International Convention for the High Seas Fisheries of the North Pacific, 4 U.S.T. 2786, as amended, 38 U.S.T. 10095, T.I.A.S. No. 9242 ("INPFC"). Under the INPFC, the Japanese give up large areas of fishing *outside* the United States 200-mile exclusive economic zone ("EEZ") in return for fishing in a relatively small area *inside* the United States' EEZ. The MMPA "specifically directs the agency to take cognizance of U.S. treaty obligations," 16 U.S.C. § 1373(b)(2). (Starr, J., dissent, App., 27a.)[9] The majority opinion refuses to take such considerations into account:

> "Today, the court features only the first factor [in § 1373(b)] in its analysis. The agency, in contrast, is not at leisure to stop at factor number one, for it has a statutory duty to consider all five. The agency, in short, cannot call it a day upon completing only one-fifth of the Congressionally ordained exercise." (Starr, J., dissent, App., 27a.)

The agency's longstanding enforcement approach at issue here has been an essential part of the basic understanding upon which Japan agreed under the INPFC to give up additional rights to fish outside the United States EEZ in order to provide further protection for marine resources. An essential element of that agreement was that the Japanese high seas salmon fleet continue to be allowed to operate inside the United States EEZ. Denying

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[9] The MMPA requires the agency to give "full consideration" to the following factors in administering the permit system:

> "(1) existing and future levels of marine mammal species and population stocks;
> (2) existing international treaty and agreement obligations of the United States;
> (3) the marine ecosystem and related environmental considerations;
> (4) the conservation, development, and utilization of fishery resources; and
> (5) the economic and technological feasibility of implementation." 16 U.S.C. § 1373(b).

the Japanese the right to operate inside will undermine their basis for remaining in the INPFC, resulting in potentially reduced protection of marine mammals and salmon of North American origin. Collapse of the INPFC would mean that the Japanese would not be subject to international regulation outside the United States EEZ. They could return to fishing for salmon closer to the EEZ and substantially increase their fishing activity. This would reduce the protection both to marine mammals and to United States-origin salmon as well as be counterproductive to the interests of conservation of marine resources and to the interests of the United States. As the agency well understood when it determined to grant the permit to the Federation, such a result is contrary to the interests sought to be promoted by the MMPA and the North Pacific Fisheries Act, 16 U.S.C. (& Supp. IV) § 1021 *et seq.* (which implements the INPFC).

As recognized by the agency, the international environmental regime produces greater protection for marine resources than does unregulated fishing outside the United States EEZ. Allowing the Japanese to continue regulated fishing inside the United States EEZ would mean that the "Japanese fisherman would continue to abide by area closures outside the U.S. EEZ, provided in the INPFC Agreement, thereby protecting marine mammals and salmon of North American origin in these areas." (NOAA Draft Environmental Impact Statement, Exh. NOAA-12, p. 62.)

Conversely, as stated by the Administrative Law Judge in the permit proceeding:

> "Not issuing a permit would not stop the operation of this gillnet fishery, and thus would not stop the taking of fur seals, Dall's porpoise, any other marine mammal, seabirds, or salmon of American origin. Not issuing a permit would result in the continued taking of these animals, but without the United States having any leverage to control this fishery. Thus, *bearing in mind the prime consideration of the best interests of the marine mammals involved, a regulated mothership fishery poses much less of a threat than does an unregulated one. This*

> *also accords with the provisions of the international accords dealing with living natural resources and marine mammals in particular.*" (Emphasis added.) (ALJ Recommended Decision 36.)[10]

And, as the Final Environmental Impact Statement in the permit proceeding stresses (at p. 14),[11] the failure to issue a permit will have the ancillary consequences of "loss of opportunity to study Dall's porpoise and assess impacts; lack of resolve of other parties to agree on an INPRO/PICES accord; and loss of Japanese markets to U.S. salmon and salmon products."

An affidavit filed by the State Department in this case demonstrates the importance of overturning the Court of Appeals interpretation. (Affidavit of Edward E. Wolfe, Deputy Assistant Secretary of State for Oceans and Fisheries, executed June 23, 1987.)[12] The State Department indicates that the INPFC agreement protects North American salmon stocks and marine mammal stocks, even beyond the United States EEZ. If the fishery relationship with the INPFC were disrupted, "it could result in North American salmon conservation schemes being irreparably damaged. It could also result in even greater losses of marine mammals than at present." (Wolfe Aff., ¶ 4.) The State Department concludes with the opinion the Court of Appeals decision could "eradicate[]" "the significant gains made by the United States in conserving North American origin salmon and protecting marine mammals in the North Pacific and Bering Sea." (*Id.*, ¶ 7.)

An affidavit filed in this case by NOAA's chief scientist on the Dall's porpoise program also makes clear the damage to important environmental research that would be caused by the Court of Appeals decision. (Affidavit of Dr. Linda Jones, executed June 19, 1987.)[13] As stated in Dr. Jones' affidavit, under the INPFC,

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[10] Appendix of Appellant Federation of Japan Salmon Fisheries Cooperative Association in the United States Court of Appeals for the District of Columbia Circuit 288.

[11] *Id.* 144.

[12] *Id.* 44.

[13] *Id.* 50.

the United States and Japan have collaborated on a series of scientific programs designed to reduce marine mammal mortality. Disruption of this type of research would work to the disadvantage of the marine mammals. Research on marine mammals could continue as long as the INPFC is maintained.

> "However, Article X of the [INPFC] Protocol has been implemented by a Memorandum of Understanding between the U.S. and Japan which sets forth the details of the cooperative research program on marine mammals. By its terms, the Memorandum of Understanding concerning Dall's porpoise research signed on June 8, 1987 by Japan and the U.S. is effective only so long as the Japanese are permitted to fish in the U.S. EEZ. If no permit is in effect, then the research covered by the Memorandum of Understanding to assess the Dall's porpoise incidental take and status of stocks would cease.
>
> Without an agreement, there would be no monitoring of incidental take of marine mammals, seabirds, or chinook salmon aboard commercial salmon vessels, and probably also not on board Japanese salmon research vessels." (Jones Aff., at ¶¶ 4-5.)

She also stresses that without information gathered by observers, the United States has no means of determining the incidental take level of marine mammals and seabirds in any of the high seas gillnet fisheries, "and thus has no means of determining the status of the porpoise stocks which would continue to be affected by the land-based salmon and squid gillnet fisheries as well as by the mothership salmon fishery when it operates outside the U.S. EEZ." *Id.*, ¶ 5. The Court of Appeals decision would also adversely affect evaluation of modified nets, collection of biological samples, and research in other Japanese fisheries. *Id.*, ¶¶ 6-9.

Laws passed since the MMPA was enacted in 1972 fully recognize the benefits of continuing to allow the Japanese fleet to fish within the United States EEZ. This was vividly illustrated when the North Pacific Fisheries Act of 1954 (16 U.S.C. §§ 1021-

35), which implements the INPFC, was amended in 1978 to reflect the amended Convention and Annex. The Senate Report acknowledged that the new measures greatly limit the total ocean area available to the Japanese fleet and provide a high degree of protection to United States origin salmon. The Report recognized that the measures permit the Japanese to fish for a limited period in a small area inside the United States EEZ, "but the fish caught there are of Asian origin, and in exchange for this the Japanese agreed not to fish in areas roughly 10 times as large outside the U.S. fishery zone." The Report went on to say that the alternative would be to close the United States EEZ to the Japanese fleet, which would not be beneficial for the conservation of marine resources:

> "[T]his would allow the Japanese complete freedom to fish the vast areas of the North Pacific beyond our zone. In addition, simple closure of our 200-mile zone would have permitted the Japanese to concentrate unlimited amounts of fishing effort in rich salmon fishing areas just outside our 200-mile zone." S. Rep. No. 924, 95th Cong., 2d Sess. 4, *reprinted in* 1978 U.S. Code Cong. & Admin. News 1080, 1083.[14]

The decision of the Court of Appeals has the perverse effect of going directly against these policies.

### C. The Agency's Approach Would Have Been Sustained Had The Court Of Appeals Adopted A Proper Standard Of Review.

The agency's approach was eminently reasonable and would have been sustained had the Court of Appeals reviewed it under the applicable abuse-of-discretion standard.

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[14] The House Report came to a similar conclusion, stating that there were "substantial benefits" to renegotiating the Convention to move the abstention line, establishing the eastern limit and permitting Japanese fishing activities for salmon within the United States EEZ. It stated that exclusion of the Japanese from the United States EEZ and the collapse of the Convention would mean that the Japanese mothership fleet would have access to North American salmon in the

### 1. NOAA's Enforcement Policy Is A Reasonable Reconciliation Of The Policy Objectives Of The MMPA.

The MMPA reflects a number of policy objectives that inform NOAA in its administration and enforcement of the Act. The enforcement approach adopted by NOAA is a reasonable approach that fully considers and accommodates these objectives. The Court of Appeals decision ignores these considerations. As pointed out by Judge Starr, the MMPA requires the agency to consider a number of factors, but the Court of Appeals takes into account only one of them. (Starr, J., dissent, App. 26a-27a.)

For example, the Act states that "negotiations should be undertaken immediately to encourage the development of international arrangements for research on, and conservation of, all marine mammals ...." 16 U.S.C. § 1361(4). The Act further instructs the Secretary to prescribe "on the basis of the best scientific evidence available and in consultation with the Marine Mammal Commission," regulations relating to taking "as he deems necessary and appropriate ... [and] consistent with the purposes and policies" of the Act. 16 U.S.C. § 1373(a). Among the factors the Secretary must consider in prescribing these regulations are "existing and future levels of marine mammals species and population stocks," 16 U.S.C. § 1373(b)(1), "existing international treaty and agreement obligations of the United States," *id.* § 1373(b)(2), and "conservation, development and utilization of fishery resources," *id.* § 1373(b)(4). It is thus entirely proper for the agency's enforcement regime to be designed to take into account these important goals. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., supra,* 467 U.S. at 865. The Court of Appeals ignored many of such statutory considerations. It never even mentions the endorsement of the agency's approach by the Marine

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Gulf of Alaska and that, according to United States scientists, an estimated 16 million North American salmon could be taken in the Gulf east of the existing abstention line and beyond the United States EEZ. (H.R. Rep. No. 1194, 95th Cong., 2d Sess. 10-11 (1978).)

Mammal Commission, which was intended by Congress to "play a significant advisory role" under the MMPA.[15]

Thus, in the light of the foregoing statutory provisions, NOAA was fully entitled to conclude that its enforcement regime should take into account that it is more harmful to ban the Japanese fishery from the United States EEZ, resulting in destablilization of the international conservation regime and potential loss of United States control over the Japanese fishery, than to maintain the regime through other available enforcement measures, such as the penalties Congress has authorized under the MMPA. The Marine Mammal Commission, which has a special statutory advisory duty in assuring the protection of marine mammals (16 U.S.C. § 1401), specifically supported the issuance of this permit for Dall's porpoise even though a small number of animals from other stocks would not be covered by the permit.

The agency reached its determination to grant a permit for Dall's porpoise only after the most careful analysis of the effect of fur seals and other stocks, taking into account the concurrence of the Marine Mammal Commission, and reasonably determining that granting the permit would not be to the disadvantage of stocks and would be the environmentally preferred alternative. Under the abuse-of-discretion standard of review that should properly have been followed by the panel majority, the agency's decision should have been reviewed to determine whether in the circumstances of the case the agency acted reasonably in determining to grant the permit.

### 2. The Legislative History And Other Authority Support The Agency's Exercise Of Discretion Here.

The agency's position is fully supported by legislative history and other relevant authority. *See Chemical Manufacturers Association v. NRDC, supra*, 470 U.S. at 126 (resort to legislative history in *Chevron*-type analysis). These demonstrate that Congress

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[15] *Committee for Humane Legislation v. Richardson, supra*, 414 F. Supp. at 304 n. 16.

has recognized the need to give this expert agency substantial flexibility in administering the MMPA. The agency's interpretation also plainly manifested itself in connection with every major proceeding on an incidental take permit for more than 10 years, which were closely monitored by vigilant Congressional committees, in reports to Congress, and in Federal Register notices, and was supported by virtually everyone who reviewed the issue. The universality of agreement to the agency's approach indicates that it reflects a permissible reading of the MMPA. The Court of Appeals ignores these important authorities.

**a. House.** During Congressional consideration that lead to the MMPA, a number of bills to create a flat prohibition on the taking and importing of marine mammals with a few relatively minor exceptions was opposed by the Executive Branch as "too restrictive and unworkable." H. Rep. No. 707, 92d Cong. 1st Sess. 12 (1971). An alternative proposal, H.R. 10240, was introduced by Reps. Anderson (of San Pedro, California, home of commercial fishing interests), Pelly, and others, which was designed to give the agency "*more flexible authority.*" *Id.* (emphasis added). The Committee (which reported out the H.R. 10240 with an amendment) adopted this approach because it was

> "the strong feeling of the Committee that the answers to these problems lie not in abolition of the concept of management, but rather in making the management that does not take place *more responsive to the true needs of the situation.*" *Id.* at 19 (emphasis added).

The floor debate on H.R. 10420 provides further support for the agency's approach.[16]

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[16] Rep. Dingell, the Chairman of the Subcommittee, spoke in support of the bill, stating that the bill rejects the "protectionist" approach. Instead, H.R. 10420 favors "enlightened effective management of marine mammals." 117 Cong. Rec. H44951 (Dec. 6, 1971). Rep. Pelly, the ranking minority member of the Committee, stressed that the bill contained "a properly balanced species management approach" that would give the regulatory agencies "flexibility." 118 Cong. Rec. H7687 (March 9, 1972). See also 117 Cong. Rec. H44956 (Rep. Goodling).

**b. Senate.** The report of the Senate Committee on Commerce, as did the report of the House Committee, indicated support for a reasonable management approach. It concluded that "the best answer to questions on the conservation of marine mammals must be the application of scientific principles and knowledge separately for each species of marine mammals." S. Rep. No. 863, 92d Cong., 2d Sess. 5 (1972). It went on to speak of the duty of "managing them wisely at an international level." *Id.* 6. (Emphasis added.) The Senate debate also stressed the need for flexible management.[17]

**c. Oversight hearings.** After the passage of the MMPA oversight hearings were held at which Congressman Dingell stated that a "rule of reason" would be applied concerning the operation of the Act with respect to the taking of marine mammals and that "[i]t was not our intention that commercial fishing be brought to a halt."[18]

**d. 1976-77 administrative proceedings.** In late 1976 and early 1977, NOAA conducted an MMPA permit proceeding (Doc. No. MMPA-1976-2) during which counsel representing over a dozen environmentalist groups, including three appellees here (*see* note 4, *supra*), confirmed that a finding of depletion of one stock would not prevent the issuance of the permit an incidental take of other stocks despite the fact that fishing operations would inevitably, although unintentionally, result in the taking of

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[17] Senator Hollings, Chairman of the Subcommittee and manager of the bill on the Senate floor, stressed the need for "room for management decisions on taking and imports;" otherwise, governments of foreign nations, including Japan, "will not be interested in bargaining with us to protect marine mammals." 118 Cong. Rec. S25256 (July 25, 1972). He praised NOAA's "careful wildlife management" program for Pacific fur seals, *id.* S25253, which "is consistent with the principle that *conservation programs should be flexible and responsive to changing ecological conditions*." *Id.* S25256 (emphasis added). Senator Stevens, the ranking Republican on the Subcommittee, stressed the need for NOAA's expertise in carrying out our effective marine mammal management program. *Id.* S25276.

[18] Hearings on Oversight of the Marine Mammals Protection Act of 1972 before the Subcomm. on Fisheries and Wildlife Conservation, 93rd Cong. 2d Sess., ser. 92-24, at 22 (1974).

some animals from that depleted stock.[19] The Administrative Law Judge agreed with this approach.[20]

**e. 1977 Congressional hearings.** Prior to and directly after issuance of the agency's final decision in 1977 in the permit proceeding, oversight hearings were held at which NOAA made it clear that the taking of depleted stocks not covered by a permit would be a matter of agency enforcement discretion.[21] In response, the Chairman of the Subcommittee, Representative Leggett, asserted that NOAA had taken "a reasonable approach," and that he was "concerned that we explore this and get this history on the record as to exactly what we are contemplating in these regulations."[22] The Marine Mammal Commission's general counsel endorsed NOAA's approach.[23] So did the participating environmental groups.[24]

**f. Proceedings before the Court of Appeals.** On March 2, 1977, Attorney General Griffin Bell on behalf of the agency requested the Court of Appeals for the District of Columbia Circuit to grant emergency relief that would allow NOAA immediately to

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[19] *See* Environmental Defense Fund *et al.*'s Opening Brief on Proposed NMFS 1977 Regulations on Incidental Take of Porpoise during Yellowfin Tuna Purse Seine Fishing Operations, Dec. 17, 1976, at 24, 66.

[20] 1977 NOAA Recommended Decision, MMPAH No. 2-1976, at 97.

[21] *Hearings before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 95th Cong., 1st Sess. at 22-23, 176, 182, 185, 188 (Dr. Robert M. White, Administrator of NOAA) (1977) (hereinafter "*Hearings*").

[22] *Id.* 185. The views of Rep. Leggett have been given particular weight concerning the meaning of the MMPA. *Committee for Humane Legislation v. Richardson*, *supra*, 540 F.2d at 1149.

[23] *Hearings* 247-48.

[24] Counsel for the Environmental Defense Fund stated as follows on behalf of several environmental groups:

> "Intent (*scienter*) is an element to be considered in determining to apply the civil and criminal penalties of any statute, including this one, absent specific language to the contrary. If observers and captains make infrequent and ultimately insignificant errors in failing to identify Eastern Spinners travelling with other species, and set upon them

implement its program for fishing that would result in the incidental taking of marine mammals even though agency work on the 1977 permit was not completed. During the court hearing on the request, the fact that depleted marine mammals not covered by the permit would inevitably be taken was made very clear to the Court.[25] The next day, despite its knowledge that there would be an inevitable take of a depleted stock, the Court of Appeals granted the government's motion to allow taking of marine mammals pursuant to an interim regime, including the 1977 regulations, until the permit was issued or April 30, 1977, whichever would occur first. *Fund for Animals v. Kreps*, No. 76-2168 (D.C. Cir. 1977).

With these various assurances the agency proceeded to publish its enforcement policy that an accidental take of the depleted eastern spinner is not a cause of issuing a notice of violation. 42 Fed. Reg. 22557, 22575 (May 4, 1977).

**g. Subsequent judicial decisions.** The approach by the Court of Appeals in *Fund for Animals v. Kreps, supra*, supplied a basis for subsequent court decisions upholding permits despite a take of marine mammals not covered by the permits.

--In 1977, an environmentalist group challenged NOAA's 1977 regulations and the permit. Counsel for the petitioner objected to the agency's enforcement policy relating to the taking of depleted stocks.[26] Despite this argument, the Court held that the

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> accidentally, the NMFS has already gone on record as saying it will be understanding, providing every effort is subsequently made to permit the mammals to escape alive."
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> • • •
>
> We ourselves have recognized the impossibility of avoiding occasional mistakes by advocating unintentional accidental take of Eastern Spinners up to 6,500, specifically to take account of the 7 percent margin of possible error." (*Hearings* 195; *see id.* 198-99.)

See also *id.* 213 (Monitor, Inc.); *id.* 266-267 (National Wildlife Federation).

[25] *Fund for Animals v. Kreps*, No. 76-2168 (D.C. Cir. 1977) (Transcript of March 2, 1977 hearing at 67-68.)

[26] *Committee for Humane Legislation v. Kreps*, Civ. Action No. 77-0564 (D.D.C., decided June 30, 1977) (Transcript 8).

regulations and permit "comply in all respects with requirements of the statute for regulations and a permit" and that "the methods of enforcement of the established quotas prescribed in the regulations and the permit, again, are reasonable and supported by substantial evidence."[27]

--Thereafter, the District Court continued to uphold the grant of permits even though there were animals taken from stocks not under the permit. *Friends of Animals v. Baldrige*, Civ. Action No. 81-1547 (D.D.C., decided May 18, 1982); *Friends of Animals v. Roe*, Civ. Action No. 80-2870 (D.D.C., decided July 31, 1981). The *Baldrige* decision upheld the Federation's permit that was granted in 1981.

**h. Congressional endorsement.** The agency's enforcement policy was repeatedly made known to Congress both by the agency and by the Marine Mammal Commission. In 1982, Congress amended the NPFA to extend the permit granted by the agency to the Federation, despite the fact that it was known that animals not covered by the permit would be taken. Pub. L. No. 97-389, 96 Stat. 1949. This was Congressional ratification of the agency's policy.[28]

### D. The Decision Of The Court Of Appeals Is In Conflict With The Law In Another Circuit.

The majority opinion also merits review because it is contrary to a decision of another Circuit (sitting *en banc*) upholding

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[27] *Id.* 44, 48.

[28] "It is *this* permit, which assumes that other, nonpermitted mammals would also be taken (notwithstanding the moratorium), that Congress itself extended in amending the North Pacific Fisheries Act of 1954, 16 U.S.C. § 1021 et seq. ("NPFA"). History thus teaches us that both Congress and the agency charged with administering the MMPA contemplated that permits would be issued in circumstances in which nonpermitted takings would inevitably occur." (Emphasis in original.) (Starr, J., dissent, App., 21a.)

NOAA's discretion concerning enforcement approaches under the MMPA.[29]

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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[29] *Balelo v. Baldrige*, 724 F.2d 753 (9th Cir.) (en banc), *cert. denied*, 467 U.S. 1252 (1984). The Court said, *inter alia*:

> "That some other remedial provision might be preferable is irrelevant. We have consistently held that where reasonable minds may differ as to which of several remedial measures should be chosen, courts should defer to the informed experience and judgment of the agency to whom Congress delegated appropriate authority." 724 F.2d at 761, quoting *Mourning v. Family Publications Serv. Inc.*, 411 U.S. 356, 371-72 (1973).